79-1412

Supreme Court, U. S.
FILED
MAR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No.

ENNA CROSMAN,

Petitioner,

-against-

LONG ISLAND UNIVERSITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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SUPREME COURT OF THE UNITED STATES

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No.

ENNA CROSMAN,

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-against-

LONG ISLAND UNIVERSITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to the Court of Appeals of the State of New York to review an order of that Court entered December 13, 1979. (App. pp. 9a-10a).

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, Kings County, dated September 15, 1978 (App. pp. 1a-6a) is not officially reported. That Court granted Long Island University's (LIU) cross-motion for summary judgment dismissing Crosman's complaint and denied as moot Crosman's motion for an order of preclusion for LIU's failure to serve a bill of particulars. The Appellate Division of the New York State Supreme Court, Second Department, affirmed (App. pp. 7a-8a) in an opinion which has been reported at 70 A.D.2d 650, 417 N.Y.S.2d 207. The Court of Appeals of the State of New York denied Crosman's motion for leave to appeal to that Court (App. pp. 9a-10a). That decision was not officially reported.

JURISDICTION

The Appellate Division of the New York State Supreme Court, Second Department, affirmed the order of the Supreme Court of the State of New York, Kings County, on May 28, 1979. The Court of Appeals of the State of New York denied leave to appeal on December 13, 1979. Jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Since this Court has permitted broad and liberal inquiry before trial on the issue of actual malice in libel cases when dealing with public figures and media defendants, should this Court now permit non-public figures having to prove actual malice in libel cases the same scope of inquiry?

2. Is summary disposition before any pre-trial discovery proper in a libel

action where proof of actual malice is involved and the defendant's state of mind is called into question?

STATEMENT OF THE CASE

Between September 1, 1972 and January 30, 1974 Crosman was Chairman of LIU's Department of Nursing. Since 1965 she had been continuously associated with LIU in various faculty positions. In July 1976 LIU's Department of Nursing prepared and published a report to the National League for Nursing (NLN) entitled "Self Evaluation Report for Reaccreditation". This publication was an express solicitation to the NLN for reaccreditation of LIU's Nursing Department. The anonymous introduction of that report contained several inaccurate, untruthful and gratuitous statements which identified Crosman and her tenure as chairman of the Nursing De-

partment with specific acts and omissions allegedly responsible for a decline of standards in the Department's programs and curriculum.

Crosman contends that the statements were defamatory on their face, injured her professional reputation as a competent administrator, and diminished the esteem, respect, goodwill and confidence in which she was formerly held in the profession. She maintained that these statements were promulgated in a malicious effort to blame her, after she was no longer a member of the nursing faculty, for shortcomings which if not explained or shown to be rectified, would present a hazzard to reaccreditation. She further contended that LIU's statements were done with actual malice, ill-will and recklessness.

LIU's answer contained an affirmative defense which stated that the alleged defamatory statements were privileged.

After issue was joined, Crosman served upon LIU a demand for a bill of particulars, portions of which required details of LIU's defense of privilege and the issue of actual malice. At LIU's failure to answer the demand, Crosman brought on a motion for an order of preclusion.

LIU thereafter cross-moved to dismiss the complaint and for entry of summary judgment in favor of LIU and against the plaintiff. The New York Supreme Court, Kings County, granted the defendant's motion for summary judgment and dismissed the complaint (App. pp. 1a-6a). That Court held that the alleged defamatory statements were made under a qualified privilege and that as Crosman had failed to prove that the defendant's statements were actuated by express malice or actual ill-will, the complaint should be dismissed. The Court conceded that generally the existence of express malice or actual ill-will are ques-

tions of fact for the jury only, but went on to state that where there is no evidence from which malice can be inferred, there is no triable issue as to malice. The Court also decided that Crosman's motion for an order of preclusion was rendered moot.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Crosman contended that the Court below did not permit her sufficient opportunity to question LIU's officers and employees on the issue of malice, either through a bill of particulars or by deposition (which she had demanded at the time she served her bill of particulars).

The Appellate Division affirmed, stating that Crosman had failed to establish that LIU was motivated by actual malice in publication of the allegedly libelous statements sufficient to defeat defendant's qualified privilege, and hence the dismissal of the complaint was proper (App. pp. 7a-8a).

REASONS FOR GRANTING THE WRIT

This petition raises the important question of whether a court should grant summary judgment to a non-media defendant in a libel action when the non-public figure plaintiff must show actual malice in meeting the defendant's claim of qualified privilege. The court below, by granting summary judgment to defendant before plaintiff had any opportunity to conduct pre-trial discovery, had effectively denied plaintiff her right to due process afforded by the Fourteenth Amendment to the Constitution of the United States (U.S.C.A. Const. Amend. 14, Sec. 1).

In the line of cases beginning with New York Times Co. v. Sullivan, 376 U.S. 254 (1964), this Court has established that when a public official is defamed, liability may not be imposed in the absence of clear and convincing proof of "actual malice". Id. at 279-280. Subsequent cases

(Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967) and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)), extended and distinguished who are public figures and who are not.

There were cases which have held that actual malice should be decided in the first instance by the trial judge and that unless the plaintiff can prove actual malice, the court should grant summary judgment for defendant. Wasserman v. Time, Inc., 424 F.2d 920 (C.A.D.C.), cert. denied, 398 U.S. 940 (1970).

But more recent cases have disagreed with that proposition. In Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438, 441 (C.A. 9), cert. denied 419 U.S. 872 (1974), the court said:

> "We agree with our brothers of the District of Columbia and Fifth Circuits that it is important that judges focus attention on the summary judgment, directed verdict and judgment

notwithstanding the verdict procedures in libel actions. When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. The Supreme Court has instructed trial courts to "examine for [themselves] the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment ... protect.' To be unprotected, actual malice must be shown with 'convincing clarity.' New York Times, supra, 376 U.S. at 285-286, 84 S.Ct. at 728-729."

It is respectfully submitted that in a libel case, as in other cases, the party against whom a motion for summary judgment is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact.

As plaintiff seeks to prove the

defendant's state of mind on the issue of actual malice, the only source of direct evidence on that issue may be the defendant. This court recently decided that in First Amendment case, where the state of mind of the defendant is an issue, a broad right of discovery was available to enable the plaintiff to obtain evidence necessary to prove this critical element of his cause of action. Herbert v. Lando, ___U.S.___, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979).

This court rejected the contention that a plaintiff should be reduced to proof of defendant's malicious state of mind solely from "objective circumstances from which the ultimate fact could be inferred" (99 S.Ct. at page 1641). Since malice depends on proof that defendant acted with improper motive, the intent or purpose with which the statements are issued, the belief of the defendant in the truth of the statements, or considerations of ill-will which defendant

bore toward plaintiff are relevant topics of inquiry (99 S.Ct. at page 1643). Direct or indirect inquiry into such matters and the state of mind of the preparers or publishers of alleged defamatory statements is not limited to media defendants (99 S.Ct. at page 1643).

> "Courts have traditionally admitted any direct or indirect evidence relative to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages (footnote omitted). The rules are applicable to the press and to other defendants alike, (footnote omitted)". Herbert v. Lando 99 S.Ct. at page 1643.

The decisions of this Court have also made it entirely clear that questions of credibility are not to be resolved on summary judgment. In Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962), the Court said:

> "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not

> have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" (footnote omitted).

Poller is especially in point because under the New York Times standard the defendant's state of mind is the focus of inquiry.

It is also well established that "'[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion.'" Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970), quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

In Cervantes v. Time, Inc., 464 F.2d 986, 994 (C.A. 8 1972), although the Court of Appeals affirmed the District Court's grant of summary judgment for the defendant in this libel action, the court did state that:

> "Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or known. For only then can it be said that no genuine issue remains to be tried."

Enna Crosman is not a public figure, and neither is LIU a media defendant. But here, where defendant claims a qualified privilege in the publication of the defamatory material, the issue of "actual malice" again is raised. Stukuls v. State of New York, 42 N.Y.2d 272 (1977). Plaintiff is put in the same position as a public figure

and required to show that the defendant was actuated by express malice or actual ill-will. Stukuls v. State of New York, supra.

Thus as in New York Times, liability turns on the state of mind of the defendant. In determining that the defendant was entitled to summary judgment on the malice issue, the courts below refused to permit the plaintiff to even conduct any pre-trial discovery. Without the ability to examine the defendant as to the anonymous authorship of the defamatory material and the issue of malice, plaintiff was left opposing defendant's motion for summary judgment with allegations of malice which the courts below found to be "suspicion, surmise and accusation". Shapiro v. Health Ins. Plan of Greater N.Y., 7 N.Y.2d 56 (1959).

The thrust of the Herbert case is to permit a broad and liberal inquiry on the malice issue before trial and against evidentiary privileges which shield dis-

closure of essential elements of a plaintiff's cause of action.

The instant case involved a privilege of a different order, but one which required a showing of actual malice to overcome it. Because the preparers of the report insulated themselves by anonymous authorship and the defendant refused to produce facts via a bill of particulars on points of inquiry deemed absolutely relevant to a showing of malice per Herbert, the plaintiff was relegated to inferences of actual malice from whatever objective facts she could muster.

Although courts have dismissed libel cases before trial, they have only after extensive and prolonged pre-trial discovery. In Vandenburg v. Newsweek, Inc., 441 F.2d 378 (C.A. 5 1971), there were two volumes, 650-odd pages, containing extensive discovery, deposition and affidavits. In Arnheiter v. Random House, Inc., 578

F.2d 804 (C.A. 9 1978), the case was three years old when defendant moved for summary judgment and plaintiff had sufficient discovery.

It is clear from the foregoing that if the defendant's motion for summary judgment had been measured by the usual tests, it would have been denied.

Two cases recently decided by this Court touched on the issue raised here, i.e. whether summary judgment dismissing a complaint is available in libel actions when the issue of malice is raised. In Wolston v. Reader's Digest Ass'n, Inc., ___U.S.___, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979), the District Court and Court of Appeals held Wolston to be a public figure and "that the First Amendment therefore precluded recovery unless Wolston proved that [defendants] had published a defamatory falsehood with "'actual malice' - that is, with knowledge that it was false

or with reckless disregard of whether it was false or not," New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)." The District Court further found that the evidence raised no genuine issue with respect to the existence of actual malice on the part of the defendants.

This Court held that Wolston was not a public figure and he was therefore not required by the First Amendment to meet the actual malice standard of the New York Times Co. v. Sullivan, supra, in order to recover from the defendants. In footnote 3 to this decision the Court indicated that Wolston had challanged the propriety of summary judgment on the issue of actual malice. This Court found in view of the disposition of the public figure issue, they need not and did not reach that question, but referred to a case decided the same day, Hutchinson v. Proxmire, ___U.S.___, 99 S.Ct. 2675, 61

L.Ed.2d 411 (1979).

In Hutchinson, a research professor brought suit against a U.S. Senator for defamation. The District Court granted summary judgment to the senator and the Court of Appeals affirmed. In this case, as in Wolston, extensive pre-trial discovery took place. The District Court had found no general issue of material fact with respect to the issue of malice. This Court found that the plaintiff was not a public figure and therefore a showing of malice was not necessary. This Court also expressed reservations about the so called rule enunciated by the District Court that "in determining whether the plaintiff had made an adequate showing of 'actual malice,' summary judgment might well be the rule rather than the exception". This Court said, at footnote 9 "Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called 'rule.' The

proof of 'actual malice' calls a defendant's state of mind into question, New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and does not readily lend itself to summary disposition. See 10 Wright & Miller, Federal Practice and Procedure, Section 2730, at 590-592. Cf. Herbert v. Lando, ___U.S.___, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). In the present posture of this case, however, the propriety of dealing with such complex issues by summary judgment is not before us."

These two cases lead us now to the case before us where petitioner herein is not a public figure claiming against a non-media defendant. Petitioner has a burden of proof which is similar to that of a public figure, namely the necessity of showing actual malice. She has been foreclosed from that step. That was error. It is respectfully submitted that the grant of summary judgment to the defendant was

also error, as it is indicated that this Court is strongly against the grant of summary judgment where the defendant's state of mind is called into issue.

CONCLUSION

The Court below dismissed Crosman's complaint before Crosman had been given the opportunity to conduct pre-trial discovery on the issue of actual malice. This summary dismissal denied her the right to due process guaranteed under the Fourteenth Amendment. If she had been given the opportunity to complete discovery, she could have presented clear and convincing evidence that defendant's defamatory statements were acuated by actual malice.

In any event, summary judgment should not lie in libel cases where the issue of actual malice is present since that issue is for the jury, not the court

to determine.

A writ of certiorari should issue as this case presents an excellent opportunity for this Court to elucidate on the footnote in Hutchinson v. Proxmire, supra, that proof of actual malice which calls a defendant's state of mind into question does not readily lend itself to summary disposition.

Respectfully submitted,

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Counsel for Petitioner

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

ENNA CROSMAN,

Plaintiff,

-against-

LONG ISLAND UNIVERSITY,

Defendant.

----------X

Memorandum

(Hon. Frank J. Pino, Justice)

(Special Term, Part I)

(Decided September 15, 1978)

The plaintiff in this libel action for damages moves for an order of preclusion against the defendant for its failure to serve a bill of particulars; the defendant cross-moves to dismiss the complaint and for summary judgment pursuant to CPLR 3212. The court will first address itself to the cross motion.

In 1976 the defendant's Department of Nursing prepared a report to the National League for Nursing entitled "Self-Evaluation

Report for Reaccreditation." The purpose of the report was to obtain reaccreditation for the defendant's Department of Nursing. The report apparently contains 160 pages of which six pages constitute the introduction. The plaintiff alleges that four sentences in the introduction defamed her. The alleged defamatory statement is the following:

> "The newly elected Chairman, despite faculty protest, maintained a policy of not consulting faculty on curriculum.
>
> In 1973, after a year of Faculty protest, regarding insufficient consultation, on department administration, a "no confidence" vote resulted in the transfer of the Chairman to a newly created Department of Community Health.
>
> During these crisis years (1970-73) there was an increase in student, faculty attrition and State Board results were markedly poorer.
>
> In spite of difficult circumstances, the faculty

> and administration have cooperated to improve the standards and the curriculum of the Department."

The plaintiff was and still is an employee of defendant Long Island University. It appears that on September 1, 1972 she became chairman of the defendant's Department of Nursing. On December 18, 1973 the faculty passed a motion of no confidence in the plaintiff by a vote of 9 to 2. On January 30, 1974 the plaintiff resigned as chairman of the Department of Nursing and accepted the chairmanship of the Community Health and Health Administration Department. She was simultaneously named assistant to the dean and assistant to the provost. On September 1, 1974 the plaintiff was promoted to the rank of Professor of Community Health. She continued as professor and chairman of the Community Health and Health Administration Department from 1974 to the present.

The defendant contends that it is entitled to summary judgment because the alleged defamatory statement is not libelous and that even if it is libelous, it was made under a qualified privilege.

The motion papers before the court indicate that the defendant had a legitimate interest in communicating the self-evaluation report to the National League for Nursing in order to obtain reaccreditation and also to obtain certain discretionary federal grants. The National League for Nursing had a corresponding interest or duty to evaluate the Department of Nursing of the defendant to determine whether to confer reaccreditation. Under such circumstances, the report was made under a qualified privilege (Stukuls v State of New York, 42 NY2d 272, 279).

To be actionable, the rule is that where the defendant's statements have been made under a qualified privilege, it is

incumbent on the plaintiff to prove that such statements were false and "that the defendant was actuated by express malice or actual ill-will" (Stukuls v State of New York, 42 NY2d 272, 279, supra). It is also the rule that summary judgment is properly granted where a qualified privilege obtains, and the plaintiff offers an insufficient showing of actual malice (Trails West v Wolff, 32 NY2d 207, 221). The existence of "express malice" or "actual ill-will" are questions of fact for the jury only where there is evidence in the case warranting their submission to the jury and the burden of proof is on the plaintiff (Shapiro v State Health Ins. Plan, 7 NY 2d 56,61). It is also the rule that

> "suspicion, surmise and accusation are not enough. The existence of earlier disputes between the parties is not evidence of malice" (emphasis supplied) (Shapiro v

State Health Ins. Plan, 7 NY2d 56, 64, supra).

The plaintiff has made allegations of earlier disputes but has offered no evidence from which malice could be inferred. There is no triable issue as to malice on the part of the defendant in making the alleged defamatory statement.

Since the court has decided that the alleged libelous statement was made under a qualified privilege and that there was no malice, the court need not decide whether the statement was in fact libelous.

Accordingly, the defendant's motion for summary judgment and to dismiss the complaint is granted, and there is no need to decide plaintiff's motion to preclude.

Settle order.

/S/ Frank J. Pino
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

----------X

ENNA CROSMAN,

Appellant,

-against-

LONG ISLAND UNIVERSITY,

Respondent.

----------X

Appeal from the Supreme Court of the State of New York, Kings County

(Decided May 28, 1979)

Penzer and Sloan, New York, N.Y. (Carl R. Sloan, David H. Gendelman and Martin Nardi Gamliel of counsel), for appellant.

Denis E. Carroll, Elmhurst, N.Y. (Angelo A. Giordano of counsel), for respondent.

In a defamation action, plaintiff appeals from an order of the Supreme Court, Kings County (PINO, J.), dated October 12, 1978, which, inter alia, granted defendant's cross motion for summary judgment and dismissed the complaint.

Order affirmed, with $50 costs and dis-

bursements.

We agree with Special Term that the plaintiff failed to establish that the defendant was motivated by actual malice in publication of the allegedly libelous statements, sufficient to defeat defendant's qualified privilege. Hence, dismissal of the complaint was proper (see Stukuls v State of New York, 42 NY2d 272, 278-280; Brennan v Granite Equip. Leasing Corp., 60 AD2d 877, 878).

SUOZZI, J.P., LAZER, COHALAN and MARTUSCELLO, JJ., concur.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of December A.D. 1979

Present, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

Enna Crosman,

Appellant,

vs.

Long Island University,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction

disbursements.

/S/ Joseph W. Bellacosa
Clerk of the Court